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ECONOMICS AND THE LAW

ANNUAL ADDRESS OF THE PRESIDENT

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As Bacon centuries ago taught men that "knowledge is to be found by careful investigation of nature, not by spinning cobwebs," and "turned men from disputations of words to an observation of the world around," so we are learning today for the first time that economics is a science that has to do with the affairs of this world and is not merely a part of abstract philosophy. Half a century ago Mill was called severely to account for asserting that while production rested on physical laws distribution rested on the conventions of society. We are just beginning to find out how wide of the mark the first part of this statement is, however true within wide limits the latter may be.

Until within a decade or two economics was considered the science of private pecuniary gain. Within very recent days the emphasis has shifted from private gain to human welfare.

The traditional economics took definite shape at the moment when the world was passing from one economic system, method of production, and business organization to another. Its principles were drawn almost entirely from the conditions then rapidly passing away. They were posited on the condition of the independent employer, who was at the same time skilled workman, capitalist or owner of the instruments of production, and actual director of industry. This was before the productive power of the world was capable of producing a large surplus wealth. The key to the industrial situation then was the trained independent employer, working within the guild for his own account under the rules formulated by the guild. The chief object of these rules was to give every man an equal chance and to assure to him the rewards of his industry and skill. Capital, in that age, though important was not a separate category. The philosophy did not provide for a condition of affairs in which the mass of the workmen were unskilled, working for wages, and the instruments of industry were owned by another class of society, for the most part devoid of technical knowledge. The main object of guild rules was always general well-being and not capitalistic profits.

The present system is based fundamentally on competition, private property, and individual freedom of contract. The universality and beneficence of competition are assumed. It is also assumed that when an individual pursues his own financial advantage successfully he creates wealth, and that, under competition, this wealth will be widely if not equally diffused and the community will thereby benefit. This teaching remained virtually unshaken in theory and universal in practice, so far as the organization of society was concerned, to something like a generation ago.

Meantime, the surplus wealth, due to the industrial revolution and the universal application of machinery, had enormously increased and these economic doctrines had become thoroughly crystalized into a body of positive law and institutions. Nowhere else was the system so thoroughly entrenched in law as in the United States under the constitutions, federal and state. Granted the underlying assumptions of this school and it logically followed that any conscious attempt to control the production, distribution, or consumption of wealth was not only an unwise and unjust interference with natural forces, but was sure to work injury in practice by making worse the very evils it was aimed to lessen or abolish.

This deprived society of a conscious aim and left the state like a ship without a rudder. With the enormous increase of surplus under such a system, it became increasingly advantageous to individuals to control this surplus. The economic doctrines, the principles of laissez-faire, together with the rapid development of means of communication and transportation, quickened all movement. Combination followed. Nor should it be forgotten that until very recently the endless extent of free land and unappropriated natural resources concealed the true condition of affairs and the general tendencies of our civilization. At the same time, the conditions of life were so easy for all that any attempt to change the constitution of society or to reform the system fell on deaf ears. The forces making for combination resulted in an unmistakable trend toward monopoly and the passing into the control of a few hands of the natural resources, the instruments of production, and, above all, the sources of credit.

It became harder each year for any man to become an independent undertaker of industry, or even to entertain a rational hope of such achievement. This caused class cleavage and social

unrest. The keeping open of the gates of immigration, together with the constant increase of automatic, or semi-automatic, machinery made the profitable employment of a lower and lower grade of workmen in our manufacturing industries possible. The incoming of these hordes of various races, tongues, and religions, prevented that effectual combination of labor which might have done something in the absence of a strong government to check the growing inequality of wealth and opportunity.

The interpretation of our constitution by which a corporate charter became a contract and a corporation was endowed with all the more important economic characteristics and rights of a natural person, destroyed competition as a controlling factor in industrial life. Lax corporation laws supplemented by liberal interpretation of the same by the courts, led the corporations to combine under various forms and to enter into gigantic trusts and combinations.

When the American Economic Association was formed about a quarter of a century ago, the prevailing system of economics taught that the state or organized society as such had nothing to do with economics, although it must be said to the credit of some of the founders that they protested vigorously against such doctrines. Economics was considered, in the English speaking world, a purely abstract philosophy—an *a priori* science. The sole function of the state was to preserve law and order, and to prevent physical violence to persons and injury to property. Under the assumption of individual liberty, freedom of contract, free and beneficent competition, whatever wrong existed would tend to right itself. Hence, society, as such, need not concern itself consciously about the conditions of production or distribution. Contrary to the theory, this beautiful system of abstract philosophy never had any very close relation to the actual world of affairs at any time, or in any place. But the increasing inequality of wealth and opportunity drove the the actual world every day farther and farther away from the prevailing theory of economics. Competition never applied as completely in any nation or community as the early economists implied, for the simple reason that to be effective competition must be between units of substantially equal bargaining power. This means not only the equal personal liberty of the contracting parties, on which we have laid so much stress, but it also calls for substantially equal intelligence, knowledge, and economic well-being. In other words, each party must be free to enter into a

given contract, or to refuse to do so, as the one result or the other promises him more advantage. The fact that one of the parties enters into a contract that he knows will be generally disadvantageous to him because he feels that if he refrains from entering into it he will be worse off than if he accepted it, fulfills neither the idyllic suppositions of the economists nor the legal conception of freedom of contract.

In the first flush of individual liberty, population was small, capital was limited and largely held in individual hands. Under the then existing circumstances the facilities did not exist for combined action or for freedom of contract. Nor was any attempt, in fact, ever made to bring within the area of freedom of contract any considerable portion of the population living at any one time in any community. First, freedom of contract arose in the days when the major portion of mankind was not free in the sense implied by the term freedom of contract. They were living in a condition of semi-freedom, or status, more or less free according to our standards, but nevertheless restricted in many ways. In many communities, even the most advanced, a large part of the population were in actual slavery. They of course were excluded. Women, minors, idiots, and many other classes were shut out from this sacred precinct.

But it was not until the days of capitalistic industry and the enormous surplus resulting therefrom, with the consequent class cleavage and the creation of the great wage-earning, non-propertied classes, that we began to discover that the majority of the personally free adult males, because of economic conditions, were quite as unfree economically as many of those whose personal freedom was limited by law.

Furthermore, it may be questioned whether or not the mere growth of fixed capital, in the absence of all other considerations, does not fix a definite limit to the effectiveness and beneficence of competition. I take it that the Ricardian doctrine of competition rests fundamentally on the belief that when two competitors attempt to supply the same market with a given commodity the price of that commodity will finally be cut to the point at which the most efficient can still sell at a profit, while the less efficient will find that price unremunerative. It further assumes that when that condition is reached the less efficient can, and will, withdraw his capital and labor and apply them to some other industry which promises at least the average reward or profit prevailing in the

community. But if such an inefficient competitor is not in a condition to make this change without total or even great loss, competition has to that degree ceased to be effective. Under such conditions, until the existing fixed capital is worn out, or until demand has increased, by the growth of society, so as to require the use of both plants at profitable prices, attempts at so-called competition are not competition at all in the Ricardian sense, and have none of the virtues ascribed to competition as the natural regulator of industry and as a protector to the consumer. In the face of these facts we invent various doctrines of so-called monopolies and begin to consider these exceptions to our rules.

But the taking of the so-called utilities, including the common carriers, out of the categories of competition and freedom of contract, does not bring the readjustment of the doctrines of private property into consonance with the popular ethical sentiments relating to the rights of property in a rapidly growing and changing civilization. Therefore, just as the decision (*Chisholm vs. Georgia*, 1793) that a citizen may sue a state was answered immediately by an agitation for amendment prohibiting such suit, and within four years by the adoption of such an amendment, so immediately after the Dartmouth College case the people began to forbid, by constitutional amendment where that seemed practicable, and by general statutes where amendment was difficult, the granting of any corporate charters without the specific reservation on the part of the legislature to alter, amend, or appeal the same. This, of course, did not reach charters previously granted.

In the absence of a constitutional amendment, it remained for the courts to step in and relax the rigors of the Dartmouth College case by strained interpretation. This was done by introducing the doctrine of the police power, which is by implication superimposed upon and made a part of all contracts. The New York courts entered first upon this practice, but it was taken up within a decade by the federal Supreme Court. This was a great extension and an entirely new application of the police power.¹ The full significance however of such application did not appear until more than a generation later.

This doctrine cut deep into the theory of the Dartmouth College case; but, what is much more significant, it placed once for all, until

¹ Cf. *The Police Power, Public Policy and Constitutional Rights*, by Ernest Freund (1904), Preface, p. v. "The law of the police power is practically a growth of the last thirty or forty years and much of it remains unsettled."

the Supreme Court reverses itself, or until the constitution is amended on this point, the power to determine public policy, and consequently the content and extent of contract and private property, in the hands of the court instead of the legislature, or more popular branch of the government. It is interesting to speculate as to what might have happened in a few decades if the doctrine of contract as laid down in the Dartmouth College case could have been maintained, and the courts had not dragged in the police power as a serious modification and mollification of that doctrine.

But even such a change did not keep the doctrine up to the changing popular ideas of the right of contract and of private property. The country found relief once more in a genuine political revolution under Jackson, which issued in the reconstruction of the court under Chief Justice Taney. When the first test case came before the reorganized court (Charles River Bridge case, 1837), it was seen at once by the court that the application of the Dartmouth College case would neither satisfy public opinion nor permit the proper development of New England, save on the sole condition that the people of Massachusetts would be willing to tax themselves to compensate the owners of the Charles River bridge for a property which had actually been destroyed when the legislature chartered the defendant company to build a parallel bridge, which, under the terms of the charter, had already become free before this decision was rendered.

But the people of Massachusetts believed that the first bridge company had received an adequate compensation for the use of its property and for all the effort and risk ever incurred, and was, therefore, not justly entitled to compensation. In the popular judgment the company had been unduly greedy, and for private gain had checked and prevented the necessary and desirable development of the community. Under these circumstances there was nothing for the court to do but to sustain the popular opinion of Massachusetts, and thereby confiscate the property of the Charles River Bridge Company, by an interpretation that can scarcely be squared logically with the Dartmouth College case, or with the earlier decisions in regard to ferries and toll bridges.

Much more striking illustrations appear in our history of the fact that you cannot by any written constitution, or fiction of holding popular opinion in check, in fact, maintain a form or content of private property indefinitely in opposition to a well formed and

deliberate public opinion; or, as a distinguished lawyer has stated it, you cannot compel a sovereign state or a whole people to be moral against its will.

But we are reminded that the wisdom of our fathers decreed by constitutional enactment that when, by changing popular sentiment, the public demands that what is now property legally acquired ought no longer to be property under the changed ethical standards, the state should in a constitutional, orderly, and legal manner, expropriate that property, and pay full value to its present owners. But the object of private property and the sacredness of contract is said to be to give to individuals the ability to count on the future to a degree that will justify them in carrying on production and making an effort to acquire property, and if such an assurance cannot be given under some form of constitutional provision production will cease and civilization will disappear. Granted that morality requires such a doctrine, and that confiscation is therefore unethical; yet, where public sentiment no longer permits that to be property which is recognized as property under the present constitution and laws, the doctrine is vain so long as you cannot compel the whole people to act against its will. Perhaps the remedy for this evil is not an attempt at compulsion by law, but genuine moral education.

If then, we admit for the sake of argument that the content of property will change, and ought to change from time to time, as the needs of society change, and that no person and no class of persons ought to be allowed to hold anything as property when such holding has come to be harmful to the common weal, let us see how the matter of compensation in such cases has been dealt with in the past. This may enable us in some measure at least to forecast the future, and possibly to avoid serious difficulties.

If we cannot compel a nation to act against its will, whether that will be good or bad, can we force it to grant compensation in cases where the right to property in the particular thing is no longer permitted by public opinion? Is it not probable that the degree to which compensation can actually be enforced in any case will depend on the extent of the gap at any time which separates actual conditions from the public judgment of what the present public welfare demands?²

² "The substance of the law at any given time pretty nearly corresponds so far as it goes with what is then understood to be convenient: but its form and machinery and the degree to which it is able to work out desired results depend very much upon its past."—O. W. Holmes, Jr., *The Common Law*, p. 1.

If constitutional arrangements are such as to enable a frequent and easy adjustment at any time, it is probable that the mass of its rights, and consequently the value involved, will in any one instance be so small that a community will be willing for the sake of the added security and the encouragement to labor and investment to expropriate those rights and pay full compensation. But where property is concentrated in a few hands, or where property has been protected by constitutional provisions to such a degree as to make a change of law difficult, if not impossible, and where that property has been enabled, by what is popularly considered unjust if not illegal means, to prevent the necessary constitutional and legal changes for a long enough time to allow the mass of property condemned by the moral sentiment to become enormous, is it likely that the public will consent to tax itself to pay compensation on the necessary scale?

Nor can one psychological consideration be safely overlooked, namely, that the longer such a condition prevails the more the owners of such property become convinced not only that they are right, and legally and morally entitled to such property, but, still more important, they come to believe that they can in fact maintain their possession by the old means indefinitely. Therefore the proposition for expropriation with compensation falls on deaf ears, and is regarded as an invasion of their most sacred rights by those who consider themselves strong enough to maintain such rights. Under such circumstances abolition with full compensation is fought almost if not quite as bitterly as direct confiscation.

Does anyone believe that the owners of nomination boroughs in England in 1832 would have been willing to give up their property rights in such boroughs, involving their whole political existence, for a money consideration? And yet Lord Eldon said they were as much property rights, "as your lordships' peerages and titles." Or, would the American slave holders, after 1850, have listened to a proposition to free their slaves for any amount of money? Or, does anyone believe that the liquor interests in America today would consent for a money compensation to have all their property expropriated, and their owners thus deprived of their present control over political life, vice, and crime? Or, has Mr. Rockefeller's utterances led us to believe that he and the other coal owners of Colorado would give up their rights "to protect their employees in their rights of individual bargaining against the labor unions" for any monetary award no matter how large? Are not

these rights too closely bound up in the minds of their owners with the political control that affects all vested rights?

In the light of history, it will, perhaps, be admitted by all that no large body of property, whether it be the public office or slaves of bygone days, or the saloons of today, can exist indefinitely against a growing sentiment that such property is injurious to the welfare of society as a whole. It is probable that no constitutional or legal forms can save such property. Furthermore, if such property is maintained for generations by what the public considers immoral means, and until the burden of compensation would stagger the public, it is doubtful whether the public will even offer compensation. This is more likely to be the case where the property is of such a nature (as in the case of slavery) that public sentiment will not allow the compensating body to recoup the price paid by the further use of the thing as property.

If these premises be correct, does the question not come down simply to this, whether when the issue is forced the owners will consent to a gradual and peaceful modification of property rights without compensation? If not, the alternative would seem to be the final appeal to force. This brings us to the primitive doctrine that one is entitled to such property only as he is physically able to defend and hold. But such a condition carries us out of the realm of law into that of mere might and reduces us to a state of nature. No one who understood the situation would want to maintain a constitutional form that reduces us to this condition. This means the abandonment of law and a shifting of the economic equilibrium by force as in the Peasants' Rebellion of 1381. In the case of the abolition of the monasteries under Henry the Eighth, as also of the political reforms in England, 1832, the property owners were better advised and consented, very unwillingly it is true, to a shifting of the economic power to other classes by more or less peaceful means. This of course involved a large modification of property rights as well as of political rights, and, in fact, a large confiscation of private property. The reforms offer a close parallel to the prohibition movement of today with its direct confiscations.

The control of government has always given content and meaning to property rights for determining the distribution of wealth among the different classes of society. In America today those in control of our concentrated wealth find themselves apparently entrenched behind an almost unamendable constitution, based upon

the eighteenth century's interpretation of natural rights, freedom of contract, individual liberty and competition. They seem to think that having worked this constitution into a form where the court is the actual determiner of public policy, and the consequent definer of the rights of property, this condition can be maintained indefinitely.

The attempt to justify the exercise of this power by the courts rather than by the legislatures, is based on the theory that the courts are the safest organ of society, because they are out of politics. The exact contrary is the fact, as can be easily determined by a reference to our own history, as well as to that of Great Britain. The people will always accomplish their ends in the long run, through political agitation and governmental action.

The courts are less well informed in regard to public opinion and sound public policy than the legislatures. The whole effect of turning such a power over to the courts is not to maintain the *status quo*, or to prevent changes in property rights, but simply to hold those changes in check and to delay them until peaceful settlement becomes much more difficult, if not impossible. *Chisholm vs. Georgia* led quickly to a constitutional amendment. The introduction of the police power by the courts of New York made the New York judiciary elective in 1846. The Dred Scott decision was wiped out by blood and treasure. The declaring of the income tax unconstitutional twenty years ago resulted in constitutional amendment. The decisions on hours of labor, sanitation, and the like, such as *Lochner vs. New York*, have led to a universal demand that the people shall have direct political power over the courts. This takes the form of an agitation for the recall of judges, or for the recall of judicial decisions on constitutional questions. The decisions in the railroad rate cases by which so many statutes have been declared unconstitutional have intensified the popular movements for direct popular control of the courts. The recent trust decisions and the "rule of reason" evoke a demand for the limitation of the power of the courts by statute or by constitutional amendment.

It remains to be seen whether or not the courts will formally reverse themselves,—whether as a result of the agitation they will become very much more sensitive to popular opinion and come to understand it better, and reverse themselves in fact but not in form, or whether we shall have by constitutional amendment an elective federal judiciary for limited term, perhaps accompanied

by the objectionable recall of judges or of constitutional decisions, or both. The doctrine that in a democracy the courts can maintain property interests unchanged for any considerable time, and more particularly the property interests of large concentrated wealth, against a well settled and determined public opinion, without grave dangers meantime, seems highly doubtful.

Be that as it may, it will always remain true that the right to determine public policy is a political right—in fact the most important and fundamental political right—over which the public is unwilling to surrender control.

The question then is, whether or not we are to keep our courts in politics, and make them a football of partisan activity, or whether we are to recognize once for all that the determining of public policy is a political function, and that the legislature is a more trustworthy political organ than the courts for such a function.

There is no higher or more important public function than the impartial administration of justice between man and man, and the enforcement of the law. That the courts ought to be removed from political influences all right-minded men admit. That this can be easily accomplished the English experience proves. It is a very significant fact that in the recent reconstitution of the English House of Lords by which it was effectually shorn of its political powers, no suggestion even was made to deprive that House of its judicial powers, for the simple reason that none but the judges took part in the legal decisions, and the judges confine themselves to declaring and enforcing the law and do not try to make the law. But the judges can never be removed from political attack and party influence in this or any other country so long as the chief political function—the determining of public policy—is performed by the courts.

The present system does not, in fact, adjust the public policy satisfactorily to the actual needs of the day. It tends, rather, to preserve the form adapted to a strictly pioneer organization of society based on economic equality and free land, while we are actually living in a marvelously complex civilization, with great inequality and with our natural resources already appropriated. Should the present decline in real wages continue for many years, the tension is likely to become very great, for inequality, with the consequent lack of bargaining ability, tends to increase at an ever-accelerating rate.

One phase of this situation found no consideration in the days of laissez-faire, and has in fact but very recently attracted attention. By this I mean that when inequality of bargaining power has reached that point where competition is highly unequal we have exploitation of the weak by the strong, without any violation of law. Again, under our theories of competition we actually depress the weaker members of society to a point at which we kill the goose that lays the golden egg by preventing these people from becoming and remaining efficient workers, and still more by preventing them from bringing up their children with sufficient general skill and energy to enable the economic production of the nation to be kept up. Nor is this an evil that either cures, or even tends to cure, itself in the absence of a strong, conscious social action on the part of the state. Hence, the widespread agitation for a legal minimum wage as a basis of maintaining the American standard of living. How strange it would seem to the economists of even half a century ago, with the theories then held of property rights and competition, to come upon such a book as Hollander's *The Abolition of Poverty*. For the economists of half a century ago believed that "the poor we have always with us" and that poverty is as necessary as profits as a spur to economic production. Under that philosophy hunger and the fear of starvation gave the same motivation to economic effort on the part of the poor as profits gave to the capitalist.

The earlier economists would doubtless be equally shocked by such a book as Ely's *Property and Contract*, which maintains that property is a social creation, and a social concept, and that private property should be neither acquired nor used in a manner injurious to the public welfare. The earlier economists would have deserted their ship had they come upon Taussig's statement that private property is now on trial and that its sole justification is that it conduces to the economic and social welfare of the people, and that the day is already come when private property with its existing rights and limitations can no longer be assumed, but must prove its right to further existence. This is an entire shifting of the burden of proof from the not remote days when private property with its present connotation was assumed without any question.

Perhaps the early economists would fail entirely to understand such a book as Hobson's *Wealth and Welfare: a Human Valuation*, or Veblen's *The Instinct of Workmanship*,—the first attempting to prove the necessity of an entire shifting of the emphasis

from private gain to public welfare, that is, social well-being, and the latter undertaking to prove that present methods of production are at cross purposes with the controlling and impelling instincts of mankind.

For centuries we have had now and then such books, but never before by professional economists of standing. Yet these are the books that are today not only receiving the most popular attention, but the ones that are actually marking out the path, however imperfectly, which economics must follow if it is to be more than a system of intellectual gymnastics or to have any effect on practical life.

Our free land has heretofore obscured the real tendencies of our economic development. This fixed, on the one hand, a definite minimum below which economic well-being could not be pressed and thus maintained a definite standard of life. On the other hand, it offered opportunities to vast numbers of people to make individual fortunes, and thus to rise to the capitalistic class. This kept alive that speculative spirit and hope so conducive to energy, enterprise, and economic efficiency and production.

The wage system as at present interpreted in our legal doctrines with the gates of opportunity closed by the complete appropriation of natural resources and by the weakened bargaining power of the individual in the uneducated, non-propertyied, working classes, presents quite a different spectacle. These changed conditions raise questions of vast import.

We have passed recently, slowly, haltingly, and against great obstacles presented by the courts, to legislation protecting women, children, and finally adult men, as to accidents, workmen's compensation, hours, and conditions of employment. However, the final attitude of the courts on much of this legislation remains to be worked out. But whatever the final view of the courts on workmen's compensation and the minimum wage may be, the economists and the general public, at least, have made up their minds, once and for all, that so far as these subjects are concerned the working classes are no longer subject to helpful or beneficent competition or the freedom of individual contract. We have very grudgingly admitted the usefulness of the collective bargaining brought about by labor unions as a necessary and desirable brake to check by united action the further disturbing of this equilibrium until we can develop a state which is strong enough to represent the social welfare and insure the progress of the nation. Compe-

tition will always play an important role in human affairs, but it remains beneficent only when society, acting through a state stronger than the strongest individual or organized group of individuals acting together, makes the rules of the game and sees to it that pigmies are not permitted to fight with giants.

To those who have watched the inability of the laboring classes to compete individually without results disastrous to them and through them to the public in general, it must be plain that could our present legal organization be maintained for a few generations our attempts at unrestrained competition under it would mean practical if not legal slavery for the non-propertied classes of today and their descendants. Under such circumstances, if the depressed classes were unable to throw off the yoke by force civilization would die for lack of sustenance. For the experience of mankind shows that no subject population limited to a given territory can, or will, produce enough economic goods to support or sustain itself. If, under such a condition of subjection the population should become stationary, and peace could be maintained, we should then have all the conditions for a civilization based on slavery, and able to continue its existence by means of forced labor alone.³

Our legal system of private property, with its present connotation, has its chief defense in the doctrine that private property is necessary in order to give a sufficient motivation for economic activity and production on a large enough scale to maintain a progressive or even stationary population. But with the exhaustion, or appropriation, of our natural resources to a point where, at present, one cannot avail himself of such resources unless he possesses considerable capital, it appears that, if our present legal organization is to continue, the hope of ever bettering their status will soon fade from the consciousness of the whole working population. When the laboring people obtain sufficient information of the actual conditions, the motivation to industry offered by the chance of owning private property will no longer influence them. And as these classes already constitute the overwhelming majority of population in every industrial nation, this argument for the existence of private property defeats itself; for if the hope of acquiring private property be the chief motive for economic production, and, if the great majority of our people are shut out from such hope, production must cease unless it is kept up under some

³ Mill's *Principles*, Ed. Ashley, p. 989.

other motive,—that is, under compulsion. In fact, the wage system as based on individual bargaining, under our present interpretation of individual private contract and private property, is as inevitably doomed as African slavery was doomed in the United States in 1860. For if private property is to be preserved as a necessary inducement to energy, thrift, and economic production, society must be so organized as to present that appeal to more than an infinitesimal and ever-decreasing portion of the population. The possibility of attaining the goal is at present too remote from the consciousness of the vast majority of mankind to have the desired effect.

This is not the time or the place to suggest a specific remedy for this evil. It is probable that a solution will be found only after a multitude of experiments in many directions, such as coöperation, profit sharing, education, and the like, many of which in the nature of the case must prove failures.

Whatever the final outcome may be it must accomplish two important results: it will give the workman a conscious share in the direction of the industry; and it will also, in addition to a guaranteed minimum wage that may as Hobson suggests be regarded not as wages but as cost, give him a share in the speculative gains or profits of the industry. So much is required to keep up the efficiency of production and to keep the workmen from sinking to the inefficiency of servile labor.

Nor does the tradition that anyone can acquire property under the present system, or the isolated instances of poor men who have become rich, negative this conclusion. The fact is that we have too recently escaped from a condition of abundant free land and substantial equality of wealth and opportunity resulting from and accompanying these unappropriated natural resources, to make any such historical examples pertinent to the present inquiry. It is pretty well agreed today that in the absence of specific and conscious social action, working through the state, social classes tend not only to perpetuate themselves, but, as time goes on, to become more and more consciously guided by class motives.

In the absence of such social action the United States now offers the most striking field for maintaining and perpetuating such classes. First, we have the greatest degree of inequality; next, we have the highest degree of rapid movement, at the same time that our large vested interests have already learned to act as a unit

to a greater degree than elsewhere, while our legal system of checks and balances prevents the government from holding such interests in check.

With our concentrated wealth and large-scale production, in the absence of a wise and conscious social policy, increased population and consequent rise in rents will tend to shut out an ever-increasing part of the population from dominion over or ownership in the natural resources and implements and tools of production.

The vague phrases, fortunately heard less frequently than formerly, about the rich becoming richer and the poor poorer, whether true or not, have no bearing on this point. Experience has demonstrated that the whole system of individualism and individual bargaining places the weaker members of society, when left to their own individual devices, in such a position as to prevent not only their improving their economic status but even their maintaining their present position. Furthermore, the degree to which concentrated control of wealth has already gone tends to make the parties more and more unequal in bargaining power. Hence it becomes easier and easier for the concentrated wealth to increase the distance between the two classes, while the ability of individuals to pass from one class to another grows constantly less. The tendency of all natural forces, under present conditions, is to crystallize and intensify class distinctions.

The present form of organization drives more and more women and children into industry, the proportion of women gainfully employed to the whole number of persons so employed having increased from 13 per cent in 1870 to 21.2 per cent in 1910, while recent figures from the stock yards district of Chicago show that out of 194 families, in 94 of which the father is the sole wage earner, the fathers earn but 54.4 per cent of the total income.⁴ At the same time that this influx of women and children into industry is taking place, real, as distinct from money wages, have constantly declined since 1906.⁵

The picture that I have drawn is not a pessimistic one. In the spirit of the earlier economists, I have merely tried to point out certain tendencies, and to show that if these tendencies were allowed to work unimpeded certain results, not pleasant to contem-

⁴ J. C. Kennedy, cited by Streightoff, *AMERICAN ECONOMIC REVIEW*, December, 1914, p. 951.

⁵ Rubinow, *AMERICAN ECONOMIC REVIEW*, December, 1914, p. 814. Cf. also W. I. King in Ely, *op. cit.*, II, p. 844.

plate, would surely follow. I have presented a mere description of what awaits us in the near future if our present legal system, with its worn out individualism and doctrines of contract and competition, could be retained for a considerable period. But fortunately, as already indicated, it is neither socially desirable nor practically possible to maintain this system unamended.

It is true that the economists have not yet formulated a definite scheme of reform, and equally true that those who profit financially by the present system think they are unalterably opposed to any change. Nevertheless, all the more important economists have had their faith in the existing system profoundly shaken. In fact, the laissez-faire doctrine has been repudiated, hence the endless confusion in economic doctrines and teaching in America today.

We have rejected the old and have not yet discovered and formulated the new. We may still believe that wages are determined by demand and supply, but we are all now convinced that what the demand or what the supply will be at any particular time depends largely on the customs, institutions, constitutions, and laws of the land, and not on any merely abstract *a priori*, philosophical, or metaphysical speculations as to the economic man. We are now trying to work out such a social control over demand and supply as to make them what it is socially desirable they should be.

Let us ask once more whether there are any natural forces that can be relied upon to bring about the reorganization now admitted to be necessary if we are to make economic and social progress. Let us ask further whether such a needed readjustment means, as we are so often told, the destruction of private property and even of existing wealth, with the consequent decay of our civilization. Does such a change necessarily involve socialism, communism, or any other form of organization inconsistent with the maintenance of private property, retaining in private property all the elements which have in practice proved themselves conducive to the general welfare?

The chief emphasis today is on human welfare. While we have come to realize that we may at any one moment urge on our economic production at such a rate as to destroy the possibilities of similar production in the future, the doctrine of human welfare as against the abstract doctrine of natural production and distribution under a system of unrestrained competition simply means such a change in our philosophy, and such a modification of private property through law reform, as will put into operation

the doctrine that the state, representing society as a whole, must have a definite social ideal, aim, and program; and that our economic doctrines, aims, and methods must all fall within that program and form a part of it. This aim may be stated as the homely one that no one has a right to acquire, or to hold, or to use private property in a manner injurious to others, or to the permanent general interest of the society of which he is a part. Theoretically, this doctrine has always been a part of the doctrine of private property, but, unfortunately, we have assumed that certain uses were not adverse to the public interest, because we assumed that they could be brought under free competition, and that having once come within these bounds they could not be harmful. From this we concluded, therefore, that they were beneficial. We are asking, therefore, today as never before, and with great earnestness, what uses and practices are really advantageous to the public, and whether or not, despite the old economists, when one does that which brings financial gain to himself he does what is best for the public.

We are even inquiring, contrary to the wisdom of our fathers, whether the private citizen necessarily always knows his own interest, and, most of all, if he does know it whether he is always economically and politically situated where he can pursue that private interest effectively.

The economists now, almost without exception, admit that our present institutions, customs, and laws do permit on a large and ever-increasing scale the use of individual and corporate property in a way that is not consistent with or conducive to public welfare and equality of opportunity.

Such reform implies a large modification of our constitutional laws, and the democratizing of both politics and business in such a manner as to do justice to all and to give every one an equal chance in life and to see that every individual born into the world has an opportunity to develop his physical, mental, social, and spiritual powers to as high a degree as possible in view of the existing power of man over matter, that is, of the general productive power of the age and country in which he lives.

If economists do not take this view of the scope, methods, and aims of economic study, they will find themselves entirely side-tracked, and economics becomes merely an *a priori* or abstract science, with no more relation to human welfare than speculation about the planetary system has.

To sum up: The old system has broken down, not because competition has disappeared or ceased to be important, but because the increasing inequalities of wealth, with the added facilities for combination, have made it impossible for the great mass of the people to compete on equal terms. "Under present conditions," as Walker says, "the game is played with loaded dice." At the same time, the constitution with its system of checks and balances has not expanded rapidly enough to enable us to meet the changed economic and social conditions satisfactorily. On the other hand, centuries of free schooling, free right of assembly, free speech, freedom of religious thought, extended suffrage, and the increased means of transferring persons, goods, and intelligence, have increased enormously the ability of the poorer classes to combine for political action. From this it follows, logically, that so soon as the dissatisfaction reaches a certain point political power must pass to the majority,⁶ that is to the working and non-propertied classes, whose members are becoming more and more class conscious. Furthermore, notwithstanding the great inequality in fortune, the working classes have sufficient interest in the outcome to give them hope and courage to work together for a reorganization of society. In spite of great divergence of opinion among them, there is a common feeling that, in the long run, economic reform can come only through political action. It is inconceivable that they should come into political power and not use that power for bringing about, through the state, the only organization including all the people, such economic changes as public opinion considers desirable in the common interest. When this idea is broached, we hear much of the danger of revolution, destruction of property, and the decay of civilization.

As against such dire prophecies, certain considerations should not be overlooked. First, the working people have been trained in political action and self-restraint for too many generations, and understand how much easier, safer, and more satisfactory such action is than violence. In the next place, they have too much at stake to risk it all on such a doubtful venture.

Notwithstanding the spectacle that Europe offers us today, the

* "It is a chimerical hope to overpower or outnumber the middle class whatever modes of voting, whatever redistribution of the constituencies are really necessary for placing the government in their hands. Those, whether we like it or not, they will assuredly obtain."—J. S. Mill, *Dissertations*, II, p. 155.

American people in general have too high a degree of material well-being to risk it in such a mad and unnecessary attempt. Truly, the present war shows that people may still be induced to fight for what they consider racial or national existence, or even supremacy, but it is far from proving that they can be persuaded or compelled to fight for the purpose of maintaining a mere definition of property rights, and that too a definition that has already been rejected by the people who would in fact have to do with the fighting and later pay the bills for the struggle. The average American shrinks too much from the very idea of blood, slaughter, pain, and hardship, to enter upon any such a wild and senseless scheme.

On the other side, much as the concentrated vested interests believe they are wronged, they of all people shrink most from personal encounter and hardship. They might be willing to encourage fighting so long as they can control the government and compel, or induce, other classes to do the actual fighting and pay the bills for them, but the moment they see the control of government passing by peaceful means from their hands the spirit of fight and physical resistance fades away. The modern millionaire and his satellites are plotting and scheming, not fighting, animals.

Still better, the more enlightened among our rich men have already become convinced that the present situation is both undesirable and untenable. All that they need is to be convinced that any proposition promises real reform to cause them to throw themselves heart and soul into it.

While the great mass of factory and other social legislation of the past generation when rightly viewed is seen to be in strict harmony with the thesis herein maintained, unfortunately it has been heretofore generally regarded as a strict exception to a general rule or theory. In fact, it is an essential part of the modern theory of property and economics. It is based on the fundamental idea that the community, if it is to adjust itself to everchanging social circumstances, must have a distinct social aim to be accomplished through the agency of the state.

Under this doctrine economics will no longer be the science of private pecuniary gain resting upon a system of abstract assumptions, but the science of men in an organized society, working within a state with a conscious social purpose. Such a state will be effective only as it is easily amenable to a wisely directed public

opinion, representing, at any time, a clear majority of the community.⁷

It would seem to require no demonstration that a state politically, or an economic organization within a state, cannot be considered in stable equilibrium, or likely to endure unchanged, when under a wide suffrage and extended political rights the majority of the people want that system changed.

But this is not a disturbing thought. It means evolution, not revolution; not abolition of private property, but the bringing of the rights of private property into harmony with the desires and needs of the age. No sudden or violent change or destruction is needed, but a gradual, orderly, and peaceful modification and adaptation of institutions, and consequently of economics, to a modern, changed environment and to public welfare.

⁷ "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong."—O. W. Holmes, Jr., *The Common Law*, p. 41.